SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4174-15T3

JAMES P. VUOCOLO, JR.,

Plaintiff-Appellant,

v.

COUNTY OF ATLANTIC, JAMES F. FERGUSON, ESQUIRE, ROBERT HOWIE, and DENNIS LEVINSON,

Defendants-Respondents.

Argued November 14, 2017 - Decided December 13, 2017

Before Judges Gilson and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-2936-12.

Christopher M. Manganello argued the cause for appellant.

Louis M. Barbone argued the cause for respondents (Jacobs & Barbone, PA, attorneys; Louis M. Barbone and Daniel J. Solt, on the brief).

PER CURIAM

Plaintiff James P. Vuocolo, Jr. appeals from an April 19, 2016 order of the Law Division denying his motion to vacate a November 23, 2015 order granting summary judgment in favor of defendants. We affirm.

Plaintiff was hired by defendant County of Atlantic (County) as a consumer protection investigator. During his employment, plaintiff reported what he believed to be illegal activities committed by other County employees. After reporting the illegal activities, plaintiff claims he was subject to retaliation and a hostile work environment.

In 2009, plaintiff filed a complaint against the County and the individual defendants alleging violations of the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14, and the New Jersey Civil Rights Act (CRA), N.J.S.A. 10:6-2. Clifford Van Syoc was retained to file the complaint on plaintiff's behalf. In 2013, Van Syoc withdrew as counsel and a new attorney took over the representation of plaintiff.

After several discovery extensions and a court conference, in August 2012, the parties agreed to dismiss the 2009 complaint, without prejudice, to permit plaintiff to refile his complaint and begin discovery anew. In 2012, plaintiff filed a new complaint alleging the same claims against the same parties.

On August 21, 2015, defendants filed a motion for summary judgment seeking dismissal of plaintiff's 2012 complaint. Concerned that opposition to summary judgment may have been misfiled, the court's staff contacted plaintiff's counsel, who requested an adjournment of the motion. The court granted a two-week adjournment to allow plaintiff to submit opposition. Plaintiff failed to submit opposition to the adjourned motion, causing the court to adjourn defendants' motion a second time. The day before the twice adjourned return date, plaintiff filed opposition to defendants' motion, nearly six weeks after the original due date for filing opposition.

Plaintiff's opposition to the summary judgment motion was substantively deficient. The opposition brief lacked any exhibits, affidavits, or certifications in response to defendants' motion. The opposition brief failed to respond to defendants' legal arguments and cited no case law to support plaintiff's arguments for denial of summary judgment.

Due to numerous deficiencies in plaintiff's opposition brief, the motion judge instructed plaintiff's counsel to submit a supplemental brief identifying the genuine and material disputed facts that plaintiff claimed required denial of defendants' motion. The judge also required plaintiff's counsel to respond to defendants' legal arguments. Plaintiff's counsel responded

that he would need an additional four weeks to file a supplemental brief with the required information. Thus, the judge adjourned the motion a third time.

After hearing oral argument, the motion judge issued a forty-five page memorandum of decision granting summary judgment. The motion judge found plaintiff merely repeated the allegations in his complaint and failed to present any evidence in support of his claimed material disputed facts that would preclude the entry of summary judgment.

Four months after the entry of summary judgment in favor of defendants, plaintiff filed a motion to vacate that order. In his motion to vacate the summary judgment order, plaintiff argued that: (1) the motion judge should have recused himself, based upon his former law firm's representation of the County in a handful of Worker's Compensation cases twenty or thirty years earlier, as well as the motion judge's conflict with plaintiff's prior counsel, Clifford Van Syoc; and (2) the summary judgment motion should be vacated in light of newly discovered evidence in the form of a 2012 deposition transcript of another County employee, Terri Hiles.

In seeking to vacate the summary judgment order, counsel for plaintiff claimed that he was notified of the motion judge's potential conflict by plaintiff the day after the summary judgment

order was entered. Counsel further claimed that he learned about Hiles' deposition from plaintiff three days before the summary judgment motion was argued. Plaintiff's counsel made these claims during oral argument on the motion to vacate the summary judgment order; however, there was no affidavit from plaintiff as to when or how he became aware of the information.

Plaintiff also argued that the Hiles deposition constituted newly discovered evidence. According to plaintiff's counsel, even though plaintiff was aware of Hiles' deposition, counsel was unaware of the content of the deposition until he obtained a copy of the transcript on November 30, 2015, after entry of the summary judgment order.

The motion judge denied plaintiff's motion to vacate the summary judgment order. The judge found that plaintiff had an obligation to inform his counsel of a deposition that might have been helpful in opposing summary judgment. The judge highlighted that the case had been pending since 2009, and Ms. Hiles was deposed in 2012. The judge concluded that a transcript from a deposition three-and-one-half years earlier was not newly discovered evidence in accordance with Rule 4:50-1. The judge noted the absence of a certification from plaintiff as to when he learned of the deposition testimony of Ms. Hiles. The judge also

found that plaintiff failed to articulate any evidence or facts to support recusal.

On appeal, plaintiff argues: (1) the motion judge should have recused himself based upon his former law firm's prior representation of the County and the motion judge's conflict with plaintiff's first counsel, Clifford Van Syoc; and (2) the motion judge should have vacated the summary judgment order in accordance with Rule 4:50-1 based upon plaintiff's counsel's discovery of the Hiles deposition transcript, which plaintiff claimed bolstered his case against defendants.

We first address whether the motion judge should have recused himself from deciding plaintiff's motion to vacate the summary judgment order. "Recusal rests in the sound discretion of the trial judge." Jadlowski v. Owens-Corning Fiberglas Corp., 283 N.J. Super. 199, 221 (App. Div. 1995), certif. denied, 143 N.J. 326 (1996). We review recusal orders for abuse of discretion. See State v. McCabe, 201 N.J. 34, 45 (2010).

Plaintiff asserts two grounds for supporting the judge's recusal. Plaintiff claims recusal was required because: (1) another attorney in the judge's former law firm represented the County in a few Worker's Compensation cases approximately twenty to thirty years earlier; and (2) the motion judge previously

disqualified himself from cases involving Van Syoc, who was plaintiff's original attorney.

The grounds for recusal are set forth in the Court Rules and the former Code of Judicial Conduct.[1] Former Canon 3(c)(1) of the Judicial Code of Conduct states that recusal is appropriate where "the judge's impartiality might reasonably be questioned." See In re Advisory Letter No. 7-11 of the Supreme Court Advisory Comm., 213 N.J. 63, 72 (2013). Rule 1:12-1 establishes the grounds for recusal.

Case law states that "without any proof of actual prejudice, 'the mere appearance of bias may require disqualification.'" State v. Presley, 436 N.J. Super. 440, 448 (App. Div. 2014) (quoting Panitch v. Panitch, 339 N.J. Super. 63, 67 (App. Div. 2001)). "However, before the court may be disqualified on the ground of an appearance of bias, the belief that the proceedings were unfair must be objectively reasonable." State v. Marshall, 148 N.J. 89, 279, cert. denied sub nom. Marshall v. New Jersey, 522 U.S. 850, 118 S. Ct. 140, 139 L. Ed. 2d 88 (1997). "[J]udges are not free to err on the side of caution; it is improper for a court to recuse itself unless the factual bases for its disqualification are shown

[1] The revised Code of Judicial Conduct is not controlling because it post-dates the order on appeal.

by the movant to be true or are already known by the court." Id. at 276.

In this case, plaintiff admits that the cases upon which he relies do not require recusal of the motion judge under these circumstances. Plaintiff provides no evidence that the motion judge ever handled a case on behalf of the County. The motion judge could not recall ever representing the County. Rather, the motion judge identified that the County was represented by another member of the judge's former firm who may have handled five cases twenty or thirty years earlier. On these facts, a reasonable, fully informed person would not have doubts as to the judge's impartiality. See DeNike v. Cupo, 196 N.J. 502, 517 (2008) (setting out the "reasonable, fully informed person" standard).

Nor do we find that the motion judge should have recused himself from deciding plaintiff's motion to vacate the summary judgment order based upon the judge's disqualification in cases where a party was represented by Van Syoc. Van Syoc's firm had ceased representing plaintiff at least two years before defendants filed for summary judgment. The motion judge was unaware of Van Syoc's prior representation of plaintiff until plaintiff's counsel argued the motion to vacate the summary judgment order. Plaintiff's hypothetical that there could be an arrangement by which Van Syoc has an interest in the outcome of plaintiff's case

is unavailing as plaintiff failed to substantiate such a claim in support of recusal. See Marshall, supra, 148 N.J. at 276.

We next address plaintiff's argument that the motion judge erred in denying his motion to vacate the summary judgment order. "A motion under Rule 4:50-1 is addressed to the sound discretion of the trial court, which should be guided by equitable principles . . . . The decision granting or denying an application to open a judgment will be left undisturbed unless it represents a clear abuse of discretion." Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994).

Plaintiff argues that the motion judge should have vacated his summary judgment order under Rule 4:50-1(a), (b), and/or (f) due to the failure of plaintiff's counsel to discover Hiles' deposition until just before the return date of defendants' summary judgment motion. Although plaintiff was aware of Hiles' deposition, counsel claims that the transcript was not contained in the file that he received from prior counsel. Plaintiff contends that Hiles' deposition transcript constitutes newly discovered evidence sufficient to vacate the summary judgment order under Rule 4:50-1(b).[2]

Rule 4:50-1 states:

[2] On appeal, plaintiff failed to address how Rule 4:50-1(a) or (f) supported relief from the summary judgment order.

> [T]he court may relieve a party . . . from a final judgment or order for the following reasons: . . . (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49; . . . or (f) any other reason justifying relief from the operation of the judgment or order.

Plaintiff has not satisfied the requirements of Rule 4:50-1. The Hiles deposition does not constitute newly discovered evidence. Plaintiff knew about the Hiles deposition nearly three years before defendants filed their summary judgment motion. Plaintiff or his counsel could easily have obtained Hiles' deposition transcript before the return date of the summary judgment motion, especially given plaintiff's belief that Hiles' testimony supported his own claims against defendants. Moreover, new evidence sufficient to vacate a judgment under the Rule 4:50-1(b) must be "material to the issue and not merely cumulative or impeaching." Pressler & Verniero, Current N.J. Court Rules, comment 5.2 on R. 4:50-1(b) (2017). Here, the portions of Hiles' deposition that plaintiff claims support his case against defendants consist of hearsay, speculation, and lay opinion.

Nor does this case present "exceptional circumstances" to justify vacating the summary judgment order in accordance with Rule 4:50-1(f). See Baumann v. Marinaro, 95 N.J. 380, 395 (1984) (granting relief from a final judgment only when truly exceptional

circumstances are present). Plaintiff's original complaint was filed in 2009. Despite five years of discovery and multiple chances to submit proper opposition to defendants' summary judgment motion, plaintiff did not present a single exhibit, affidavit, certification, or any other evidence to defeat defendants' motion.

Under these circumstances, we find that plaintiff presents no basis on which to overturn the motion judge's denial of the motion to vacate summary judgment.

Affirmed.